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No. 95-1841

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

KENNETH A. PELS, SR.,

Petitioner,

vs.

DISTRICT OF COLUMBIA BAR ASSOCIATION,

et al.

On Petition for a Writ of Certiorari
to the District of Columbia Court of Appeals

BRIEF FOR DISTRICT OF COLUMBIA BOARD ON PROFESSIONAL RESPONSIBILITY AND BAR COUNSEL IN OPPOSITION

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12 pp

QUESTION PRESENTED

Whether the District of Columbia Court of Appeals correctly ordered Petitioner's disbarment and restitution of $432 to a former client, based upon his misappropriation of funds belonging to the client and related violations of the rules of professional conduct applicable to members of the District of Columbia Bar.

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OPINION BELOW

The opinion of the District of Columbia Court of Appeals, disbarring Petitioner and ordering restitution (Pet. App. 1), appears at 653 A.2d 388 (D.C. 1995).

JURISDICTION

The judgment of the court of appeals for which review is sought was entered January 30, 1995. Petitioner filed a motion for leave to enlarge the time within which to file a petition for rehearing or rehearing *en banc,* which motion to enlarge the court granted by order entered March 8, 1995. The court denied Petitioner's petition for rehearing or rehearing *en banc* by order entered December 12, 1995. Petitioner initially filed his petition

for writ of certiorari on or about March 13, 1996 (the precise date is unknown to respondents), and the Clerk rejected the filing as out of compliance with the Court's rules. Petitioner refiled his petition on May 13, 1996.

STATUTE AND RULES

The pertinent statute conferring jurisdiction on the court of appeals to discipline members of its Bar, and relevant rules of professional conduct prescribed by the court and of procedure prescribed by the Board on Professional Responsibility, are set out in an Appendix to this brief.

STATEMENT OF PROCEEDINGS BELOW

Petitioner is a disbarred attorney and former member of the District of Columbia Bar. He was the subject of formal disciplinary charges proffered by the Office of Bar Counsel, arising from his legal representation of Elizabeth Langlois in a personal-injury claim.[1] Throughout the disciplinary proceeding below, Petitioner was represented by legal counsel. A hearing committee of the Board on Professional Responsibility concluded that Petitioner had misappropriated his client's funds, among other ethical infractions, and recommended his disbarment. The Board on Professional Responsibility upheld the finding of misappropriation but divided concerning the proper sanction.

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[1] Kenneth Pels, the Petitioner here, is referred to as the "Respondent" throughout the proceedings below.

The District of Columbia Court of Appeals upheld the finding of misappropriation. The court ordered Petitioner's disbarment and restitution of $432 to the former client. The court subsequently denied Petitioner's applications for rehearing and/or rehearing *en banc*.[2]

The proofs received at the evidentiary hearing showed that Petitioner entered into a contingent-fee agreement with his client in 1986 to handle her personal injury claim. Petitioner received settlement funds on his client's behalf in 1989 but failed to distribute in a timely manner the portion due medical providers as provided in a disbursement sheet furnished the client. Rather than safeguard the entrusted funds in an escrow account, as he was required to do under the applicable rules of professional conduct, Petitioner deposited the funds in a personal bank account. Thereafter, in payment of his client's medical obligations, he tendered checks, drawn on his personal account, that were returned for insufficient funds. Ultimately, he negotiated a reduction in one of the medical bills. He pocketed the savings without notifying his client that he had recovered additional sums on her behalf. 653 A.2d at 391-92 (Pet App. 3-7).

The hearing committee, the Board and the court of appeals all agreed that Petitioner's misappropriation of client funds was the product of intentional or reckless behavior rather than mere inadvertence or negligent mistake. Under well-settled decisions in the District of Columbia, the disciplinary sanction for such professional misconduct is disbarment. *See In re Addams,* 579 A.2d 190 (D.C. 1990) *(en banc)*.

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[2] The Board on Professional Responsibility is a nine-member body appointed by the Court of Appeals pursuant to D.C. App. R. XI, Sec. 4 to oversee the administration of the District of Columbia Bar's disciplinary system and to serve as an intermediate appellate tribunal in the review of original cases brought by Bar Counsel, who is appointed by the Board. The District of Columbia Bar Association is a voluntary organization that has no connection with the present proceeding. The undersigned Bar Counsel appears here on his own behalf and that of the Board; he does not appear on behalf of the Association.

ARGUMENT

Petitioner disclaims any effort before this Court to contest his disbarment (Pet. 4). Rather, he appears to seek this Court's review of the court of appeals' order of restitution. That order rests upon the court's determination that the settlement funds remaining in Petitioner's hands after he negotiated a reduction in his client's medical bill belonged to the client rather than to him. The question sought to be presented is not properly before the Court and, in any event, does not merit review. *See* Sup. Ct. R. 10.

1. The contention that the ruling below amounts to an infringement of Petitioner's freedom of contract was not presented below. Although Petitioner argued unsuccessfully that he was entitled under his retainer agreement with the client to retain the surplus remaining after he secured the reduction in the medical bill, he never asserted that an unfavorable ruling on that issue would amount to a deprivation of a right secured him under the federal constitution. Thus, the question is not available to Petitioner now.

2. Petitioner's federal constitutional claim rests upon a factual premise rejected by the court below. Petitioner argued that his retainer agreement with the client permitted him to recoup unspecified expenses, notwithstanding a clause in the disbursement sheet that waived administrative expenses above a stipulated amount. The hearing committee, the Board and the court of appeals all ruled adversely to Petitioner on this issue, concluding that the waiver language in the settlement sheet was controlling. 653 A.2d at 391 (Pet. App. 18-20). The court's order directing restitution followed a settled line of cases in which the respondent attorney has been required to restore client funds as a remedy ancillary to the disciplinary sanction. *In re Robertson,* 612 A.2d 1236, 1239-40 (D.C. 1992) (collecting cases); *In re Solomon,* 599 A.2d 799 (D.C. 1991).

3. The judgment below disbarring Petitioner rests upon the independent ground that he committed intentional or reckless misappropriation when he initially deposited his client's settlement funds in non-escrow accounts, the balances of which thereafter fell below the levels required to satisfy his ethical obligations in handling the entrusted funds. 653 A.2d at 395-98 (Pet App. 12-16). That finding mandated Petitioner's disbarment under the *Addams* rule without regard to his subsequent mishandling of the balance remaining at the conclusion of the legal representation.

4. Petitioner's remaining contention that Bar Counsel somehow engaged in fraud or other misconduct in withholding evidence concerning the client's understanding of her retainer agreement with Petitioner (Pet. 8-9) was not raised below and in any event is without merit. Ms. Langlois appeared as a Bar Counsel witness at the hearing and was available for cross-examination. *See* Pet. App. 27. Pursuant to the Board's rules, Bar Counsel's files were available to Petitioner for inspection and copying at any time during the disciplinary proceeding. *See* Board Rule 3.1 (Resp. App. 2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

STATUTES AND RULES

District of Columbia Code, Sec. 11-2502:

> "The District of Columbia Court of Appeals may censure, suspend from practice, or expel a member of its bar for crime, misdemeanor, fraud, deceit, malpractice, professional misconduct, or conduct prejudicial to the administration of justice. A fraudulent act or misrepresentation by an applicant in connection with this application or admission is sufficient cause for the revocation by the court of such person's admission." (July 29, 1970, 84 Stat. 521, Pub. L. 91-358, title I, Sec. 111; 1973 Ed., Sec. 11-2502; June 13, 1994, Pub. L. 103-266, Sec. 1(b)(112), 108 Stat. 713.)

District of Columbia Court of Appeals Rule XI Governing the Bar, Sec. 3:

> "(a) Any of the following sanctions may be imposed on an attorney for a disciplinary violation: (1) Disbarment by the Court . . .
>
> "(b) When imposing discipline, the Court or the Board may require an attorney to make restitution either to persons financially injured by the attorney's conduct or to the Clients' Security Trust Fund . . . , or both, as a condition of probation or of reinstatement."

District of Columbia Code of Professional Responsibility, Disciplinary Rule 9-103(A):

> "All funds of clients paid to a lawyer or law firm, other than advances for costs and expenses, shall be

deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated and no funds belonging to the lawyer or law firm shall be deposited therein . . . "

District of Columbia Board on Professional Responsibility, Rule 3.1:

"During the course of an investigation of a complaint and following the filing of a petition, respondent shall have access to all material in the files of Bar Counsel pertaining to the pending charges that are neither privileged nor the work product of the Office of Bar Counsel. Respondent may, upon two working days' notice, orally request access to such files. Any dispute arising under this chapter shall be resolved, after the filing of a petition, by the Hearing Committee Chair upon written application by respondent."